IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

No. 2608

W. G. SIMPSON AND S. D. SIMPSON, PLAINTIFFS IN ERROR,

vs.

THE UNITED STATES OF AMERICA, DEFENDANT IN ERROR.

ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

Brief and Argument for Defendants in Error

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United States Attorney, District of Idaho.
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In this case, as there are thirty-one assignments of error on the part of the defendants, only part of which are argued by defendants' attorneys, we will take up the arguments as they are presented in the brief of defendant, and we will refer to plaintiffs in error as defendants, as has been done by the attorneys for plaintiffs in error.

DEFENDANTS' FIRST ASSIGNMENT OF ERROR.

"The Court erred in overruling defendants' plea of jeopardy and former acquittal."

On the trial of the case on September 14, 1914, after the

opening argument for the Government, two attorneys for the defendants had made their argument and during the argument of the third attorney for the defendants, the question of sufficiency of the indictment was raised by the attorney in his argument and he called the attention of the court to the fact that the indictment did not contain the words "without authority of the board of directors" and moved the court for a peremptory instruction to the jury to return a verdict of not guilty, which the court refused to do, and dismissed the indictment on account of the defect mentioned by the defendants' attorney, which formed the grounds of his motion, and held the defendants for the next grand jury, which was called in February, 1915, which jury found a new indictment against the defendants.

On the 23rd day of February, 1915, on being arraigned on the new indictment, defendants filed a plea of former jeopardy, the Government filed a replication to the plea, and the journal entry of the court proceedings was introduced in evidence, which is as follows:

"September 18, 1914.

"The trial of this cause adjourned on yesterday for further hearing and was this day resumed. Jury called and found to be present and the respective counsel being in court. C. H. Lingenfelter, Esq., addressed the court and jury on behalf of the defendant S. G. Simpson, followed by Wm. A. Stone, Esq., on behalf of the defendant, W. G. Simpson. Here the defendant, by Wm. A. Atwell, Esq., moved the court for a peremptory instruction to the jury to return a verdict of not guilty, which motion was opposed by counsel for plaintiff and after argument the court ordered that said motion be denied, to which ruling the defendants by their counsel excepted in due form of law, which exception was allowed. The court thereupon ordered that the indictment in this cause be quashed and discharged the jury from the further con-

> sideration of said cause, and upon motion of the United States District Attorney it was ordered that cause be re-submitted to another grand jury and ordered that the defendants be each admitted to bail in the sum of $2500.00."

After argument by counsel for the Government and the defendants, the court directed the jury to find for the Government on the plea of former jeopardy, which was done, and then the defendants pleaded not guilty and the trial proceeded, resulting in a verdict of guilty as to both defendants.

ARGUMENT.

In the case of *Ball vs. United States*, 163 U. S., p. 662, cited by defendants, the defendants sued out a writ of error, the judgment and sentence were reversed, and the indictment ordered to be dismissed. The defendants were tried again upon a new indictment for the same offense and pleaded former jeopardy, which plea was overruled by the court, which action was upheld by the Supreme Court. And the Court says in that case as follows:

> "Their plea of former conviction cannot be sustained because upon a writ of error, sued out by themselves, the judgment and sentence against them were reversed and the indictment ordered to be dismissed. The Court, therefore, rightly overruled their plea of former jeopardy and cannot be prejudiced by the Court afterwards permitting them to put in evidence the former conviction and instructing the jury that the plea was bad."

Bishop's New Criminal Law, Vol. 1, Sec. 1021, paragraph 2, states:

> "An indictment so ill in its averments that any judgment thereon will be reversible for error, is too defective a preliminary thing of record for a jeopardy upon it to be possible. Therefore, though there has been a form of trial on it, the defendant may be indicted anew."

Paragraph 4 of the same section reads:

> "In reason, and not contrary to the authorities, if on the verdict coming in the prosecuting officer discovers a defect in the indictment, he may, instead of moving for sentence, enter a nolle prosequi, and indict anew. The Tennessee court, without passing on this exact question, held 'that a nol. pros. entered with the assent of the court, even after the jury is impaneled and proof heard, where the indictment is bad, does not operate as an acquittal, as there was no legal jeopardy.' Indeed, plainly since there can be no jeopardy on an invalid indictment, any discontinuance of it while there is no subsisting judgment is no bar to a subsequent prosecution for the same offense."

Paragraph 4, Sec. 1027, Bishop's New Criminal Law:

> "Where at any stage of the proceedings the defendant procures the indictment to be quashed, he cannot in bar to a new one assert that the first was good and he was in jeopardy under it."

See also,

United States vs. Jones, 31 Fed. p. 725:

Neither at common law nor by our constitution will a conviction or acquittal, when the penalty has not been infliicted upon a void proceeding or indictment, operate as a bar to a subsequent indictment for the same offense. Also ex parte Lange, 85 U. S. 163, 21 L. E. 873.

In the case of Thompson vs. United States, 155 U. S. 271, 39 L. E. 147.

> "Courts of justice have authority to discharge a jury from giving any verdict whenever in their opinion there is a manifest necessity for the act or ends of public justice would otherwise be defeated and to order a trial by another jury and the defendant is not thereby twice put in jeopardy within the meaning of the fifth amendment to the Constitution of the United States."

Mr. Justice Shiras states in his decision that the question raised by the plea of former jeopardy is sufficiently answered by citing

United States vs. Peraz, 22 U. S., p. 9.
Simmons vs. United States, 142 U. S. 148.
Logan vs. United States, 144 U. S. 263.

DEFENDANTS' NINTH ASSIGNMENT OF ERROR.

"The Court erred in overruling the defendants' demurrer and motion to quash the bill of indictment because said indictment is in fact duplicitous in that it attempts to charge more than one offense in the same count, to-wit: Commission of an act to injure the bank, commission of an act to defraud the bank, the issuing of a certificate of deposit, and putting forth of a certificate of deposit—four separate and distinct felonies."

On page 27 of defendants' brief it is stated by defendants' attorneys that the indictment charges "and with the intent to injure and defraud said association," which is used three times in the indictment; that is, that the conjunction and between the words "injure" and "defraud" is used in the indictment in place of the disjunctive "or." In answer to this argument we cite the case of *Ackley vs. United States*, 200 Fed., p. 221.

"Where a statute denounces several things as a crime the different things connected by the disjunctive 'or' the pleader must connect them by the conjunctive 'and.' Before evidence can be admissible as to more than one act and that an indictment drawn in this way is not bad for duplicity, but on the other hand, if the pleader in drawing this indictment in question had used 'or' instead of 'and' it would have been bad for uncertainty."

This objection has already been passed on in this Court, in the case of *Tiberg vs. Warren*, 192 Fed. 458.

> "The specific objection of duplicity is made to the complaint, because it alleges a breaking and an attempt to break. We understand, however, that where the statute makes the commission of different acts each an offense, and such acts are stated disjunctively in the statute, two or more or all such acts may be embraced in a single count in the indictment, but that they should be set forth conjunctively; that is to say, where the word 'or' appears in the statute the word 'and' should be employed in the indictment."

As to the last part of this assignment of error, found on page 32 of brief of plaintiff in error, it is only necessary in answer to this to read the certificate in question found on page 9 of the transcript of record.

DEFENDANTS' THIRD ASSIGNMENT OF ERROR.

> "The Court erred in refusing to permit the defendants to prove by themselves and the board of directors of the American National Bank of Caldwell that the issuance of the certificate of deposit in question was ratified by the board of directors as soon as they knew it had been issued and arranged for its payment by the discounting of Director Walter's note."

ARGUMENT.

The act of defendants in issuing a certificate of deposit, as charged in the indictment, was a criminal act. Section 5209 R. S. U. S. And no ratification by the board of directors of the bank of such act could make it any less criminal. In other words, we fail to see how an act constituting a crime can be ratified by anyone so as to take away its criminality. In the case of contracts or dealings between parties, or their agents, acts may be ratified but in this case where the act charged was with intent to injure and defraud the bank there was and could not be a ratification of the act, and further than that the evidence in the case fails to show that there ever was

a meeting of the board of directors, but on the contrary shows that there was no meeting of the board of directors, but on the return of the certificate from Kentucky on the 27th day of September, 1913, the certificate was paid, not because any money was in the bank, which the certificate certified was there to pay it when due, but by Director Walters giving his note in payment thereof, and even after the certificate was sold or discounted in Kentucky, the money returned to Idaho to the American National Bank, it was not placed to the credit of the certificate of deposit but was placed to the credit of the defendant, W. G. Simpson. And before the certificate became due on September 27th, this $2425.00, the proceeds of the certificate of deposit had been checked out of the bank by W. G. Simpson and his brother, S. D. Simpson, and this was the only, or nearly the only, deposit, the only one covering anywhere near the amount of money checked out by W. G. Simpson during the six months intervening between the issuance of the certificate of deposit and the time when the same came due.

The question of the letter of instructions of W. G. Simpson and S. D. Simpson was submitted to the jury, which found against the contention of defendants, and in this connection the evidence of S. D. Simpson was that no letter of instructions came with the proceeds of the certificate of deposit, while his brother, W. G. Simpson, claimed that he gave very explicit instructions as to what should be done with it. Under this assignment of error it is claimed, on the part of the defendants, that the court erred in refusing to give special charge No. 2, which is found on page 36 of defendant's brief. All we need to say in answer to this is that a cashier in the regular course of business might issue certificates of deposit when the money or the equivalent thereof was paid to the bank and

could be used in payment of the certificate when it was afterward presented for payment, but in the regular course of business no cashier could issue and put in circulation, or put forth a certificate of deposit, or sign a certificate of deposit in blank and send it out to be filled out and negotiated, increasing the liabilities of the bank to the amount of the certificate without, at the same time, receiving full value for the amount called for by the certificate. This instruction would say to the directors of the national bank, or to the officers of a national bank, you can issue certificates of deposit to anyone applying to your bank for such certificate. It may be out for six months, or a longer period of time, a liability of your bank unknown to the Comptroller of the Currency, unknown to the bank directors, unknown to anyone except the cashier and the man to whom he issued it, increasing your liabilities to that amount, and at the time that such certificate becomes due it may be presented at your bank, your board of directors ratifies such act and thus remove from the act all criminality.

If such were the law, no bank officer, Comptroller of the Currency, agents appointed to investigate banks, or anyone in any way interested other than the man who issued the certificate, and the one to whom it is issued, could ever know the condition of the bank.

It is claimed on the part of the defendants that there was a ratification of the acts of the defendants by the board of directors. The Court instructed the jury that they must find there was an intent on the part of defendants to injure or defraud the association at the time the certificate was issued and put forth in order to convict, and the jury so found, and such being the case the crime was committed at that time and

no act on the part of the directors could afterward divest the acts of defendants of its criminality. A principal may ratify the acts of an agent and in many ways an act of one person may be ratified by another or others, but we fail to see how an act, which is made a crime by the law, can be divested of its criminality by an act of another or others. All the cases cited by defendants in their brief on pages 37 and 38 arose out of the ratification of contracts and are not any way in point in the consideration of a criminal case. If the acts of defendants were personal acts against the directors of the bank they might condone the offense, but when the acts complained of were a violation of the laws of the United States the directors of the bank would be powerless to set aside that law and make a legal act of what the law says is a crime. Did the board of directors ratify the issuance of a certificate of deposit? For six months such certificate was out as an obligation of the bank and during that time the bank's liabilities were increased to the amount of the certificate. The directors knew nothing of its existence; the bank examiner knew nothing of its existence; no record of it had been made on the books of the bank; it had been taken from the bank's blank certificates in numerical order far enough ahead of March 27, 1913, so that presumably it would not be reached for six months and when its number was reached the number on another certificate was changed in an attempt to cover up the transaction and when it was presented September 27, 1913, for payment there were no funds with which to pay it. Under those circumstances, did the act of the directors, or one of them, in raising the money to take care of the certificate of deposit ratify the crime committed six months previously, and, further, did the acts of defendants show a desire on their part

to realize funds for the bank? The proceeds of the certificate of deposit were credited to the private account of W. G. Simpson, and long before the certificate of deposit became due had been checked out by the defendants for their own use.

Judge Benedict in the case of *United States* v. *Eno*, 56 Fed., p. 218, uses the following language:

> "The president of a national bank is not the association, nor are the president and directors the association. They are only officers of the association. The money of the stockholders and of the depositors in the association are not the moneys of these officers, but of the association; and it has not yet been held that a national bank may be pillaged of such moneys by its president, with impunity, provided the act be done in pursuance of a conspiracy between the president and the directors, or a majority of them."

The acts of defendants in this case if acquiesced in by the board of directors in the first instance, and the certificates given out as they were given out, and used by the defendants in this case, if done with the knowledge, consent and approval of the board of directors would have constituted a conspiracy on the part of the defendants and the directors.

DEFENDANT'S FOURTH ASSIGNMENT OF ERROR.

> "That the Court erred in refusing to permit the defendants to show by the defendant, S. D. Simpson, that he, the defendant, S. D. Simpson, executed a warranty deed to his home," etc.

ARGUMENT.

On page 82 of Transcript of Record, the Court in his charge to the jury uses the following language:

> "In September, when the certificate of deposit was sent to another bank at Caldwell for collection, and was pre-

sented for payment, some arrangement was made by which the defendants, or one of them, took care of it and protected the bank against loss. Such is the testimony on behalf of one or both of the defendants."

Such being the case, what was afterwards done by one, or both, of the defendants in paying the amount that Director Walters had paid to take up the certificate was immaterial and properly rejected by the Court. In this connection we wish to quote from the case of *United States* vs. *Harper*, found in 33 Fed., p. 471, and quote from the top of page 492, as follows:

"Gentlemen of the jury, the defendant has explained to you, and which, by the way, is not competent nor relevant to this transaction, that at this time he was making desperate and heroic efforts to save the bank. This is not relevant in this case. The man who scuttles a ship may, as she is in the act of sinking, exert desperate and even heroic efforts to save it from the peril which his own wrongful act has produced; but such efforts do not change the character of the wrongful act which put the vessel in danger. If I were to wrongfully fire upon you and produce a dangerous wound, I may, with all my skill and energy, try to stanch the flow of blood, but it does not change the criminal act which produced the wound. If he had intended to refund all those moneys, and had had the means to do it, and had come in on the morning of the twentieth of June and said, 'I have taken out $2,800,000 from the funds of this bank, and here is the money in gold coin to replace that sum,' it would not change the criminal character of the previous act. So, gentlemen, do not be misled by anything of this sort."

DEFENDANT'S FIFTH ASSIGNMENT OF ERROR.

"There was error in the Court's ruling as to venue, or place where the certificate was issued or put forth."

ARGUMENT.

To sustain the Government's position as to this assignment, we cite Section 42 of the Judicial Code of the United States, R. S., 731, as follows:

> "When any offense against the United States is begun in one judicial district and completed in another, it shall be deemed to have been committed in either, and may be dealt with, inquired of, tried, determined, and punished in either district, in the same manner as if it had been actually and wholly committed therein."

The above section of the Revised Statutes was considered by the Supreme Court of the United States in the case of Hyde vs. United States, 225 U. S., 347, 56 Law Ed. 1114:

> "The doing of the overt act prescribed by U. S. Rev. Stat., Sec. 5440, as necessary to the offense of a conspiracy to defraud the United States, defined by that section, renders applicable, where the place of the overt act and of the entry into the unlawful combination were in different Federal judicial districts, the provision of Sec. 731 (U. S. Comp. Sta. 1901, p. 585), creating a double jurisdiction where an offense against the United States is begun in one district and completed in another."

and in the case of *Brown* v. *Elliott*, 225 U. S. 392, 56 Law Ed. 1136, where the contention now made by the Government was upheld. To the same effect are the cases in re *Palliser*, 136 U. S., 257, 34 Law Ed. 514, *Burton* vs. *United States*, 202 U. S. 344, 50 L. Ed. 1057, and *Moses Haas* vs. *Wm. Henkel*, 216 U. S., p. 460, 54 L. Ed. 569.

There is no question in the present case but that the certificate of deposit was signed at Caldwell, Idaho, by S. D. Simpson, cashier, and given to his brother, W. G. Simpson, at that time president of the bank, and that it was in such a form

that all that was to be done by W. G. Simpson was to date it, which he says he did, Trans. 122, and dating it back to the day he received it from S. D. Simpson in Caldwell, Idaho, to fill in his own name, and the amount, which in this case was $2500.00. According to the law as laid down in the decisions just cited and Section 42 of the Judicial Code, the Court was right in refusing to give special charge found on page 43 of the brief of plaintiffs in error, and he was right in refusing special charges Nos. 3 and 4, and the first special charge on page 45 of said brief, and committed no error in giving the charge on the bottom of page 45 of said brief.

DEFENDANT'S SIXTH ASSIGNMENT OF ERROR.

The sixth assignment of error is fully answered in the argument under the ninth assignment of error as to the use of "or" and "and" in the indictment.

DEFENDANT'S TENTH ASSIGNMENT OF ERROR.

> "The Court erred in overruling the defendant's demurrer and motion to quash the indictment because said indictment states no offense against the laws of the United States in that the acts therein attempted to be alleged might be entirely innocent because the statute does not require that one shall have on deposit with a bank that issues to him a certificate of deposit the sum of money therein specified nor any part of it."

The indictment negatives the statement in the certificate, namely, "that W. G. Simpson has deposited in this bank $2500.00 payable to the order of himself in current funds on the return of this certificate, properly endorsed, six months after date." This was sufficient to allow testimony that no such deposit was made and the books of the bank showed that no such amount was on deposit at that time by the defendant,

W. G. Simpson, and if, as suggested by defendant's attorneys in their argument, a person had the money in his hand, or a note which the bank would accept, or made any other arrangement satisfactory to the bank, or its officers, they would issue him a certificate of deposit. We agree with defendants' attorneys as to the officers issuing a certificate in such case, and if they did, the note, money or satisfactory arrangement would be such as to represent the amount of money named in the certificate, and the bank books would show it, but such are not the facts in this case as claimed on the part of the Government or on the part of either of the defendants. Such issuing, if the arrangement had been made, the note given, or the money handed to the cashier, would have been in the regular course of business. The indictment alleged a state of facts that showed an offense against the laws of the United States, and if more was alleged than necessary the most that could be claimed for it would be surplusage.

DEFENDANT'S THIRTEENTH ASSIGNMENT OF ERROR.

> "The Court erred in overruling the defendants' motion in arrest of judgment because such motion specifically attacked the validity of the indictment, the validity of the trial, showed that the defendants had been formerly in jeopardy and formerly acquitted and that the Court had erred in the conduct of the trial and in giving certain instructions to the jury and in refusing to give certain special instructions of the defendants, all of which more particularly appears from said motion to arrest which is referred to and made a part of this Assignment."

ARGUMENT.

The court had in its charge given a very full explanation of the material elements of the offense charged against the

defendants as follows, Trans. 76: First, that the Bank of Caldwell, of which S. D. Simpson was cashier, was a National Bank Association; Second, that he, S. D. Simpson, was at the time cashier thereof; Third, that S. D. Simpson issued or put forth the certificate in question, and that he did so within the State of Idaho; Fourth, that the issuance of the certificate was without authority of the board of directors; Fifth, that it was issued with intent to injure or defraud the bank or its depositors or stockholders. It is necessary for you to find in the affirmative upon all of those five issues in order to find him guilty, and further, that as to W. G. Simpson, it was necessary, in addition to that, to find that he aided and abetted S. D. Simpson in so acting, and with intent on the part of him, W. G. Simpson, also to injure or defraud the bank.

The court then explains reasonable doubt, and that they must be satisfied beyond a reasonable doubt of every material element as charged in the indictment before they could convict. Defendants' attorneys, as one of the grounds of this argument, states that when the jury were called into court in the night time, having deliberated for some time, they were not satisfied on the question of intent. The Court then told them practically what he had given them in his instructions regarding intent, and no exception was taken to what he told them at that time, and such re-statements were not suggested by anyone as stated in the statement on page 54 of the Brief of Defendants. The jury was out less than 12 hours and we respectfully submit that the jury were in comfortable quarters, given a breakfast in the morning, and were not out a sufficient length of time to be in such mental or physical condition that they could not render a true and just verdict.

Hyde vs. United States, 225 U. S. 347, 56 L. E. 1114.

In the case where the jury had been kept together during a long trial, and after deliberation for three days and nights and had been further instructed a number of times during that time, the Supreme Court holds that the verdict was not on account of coercion.

DEFENDANT'S FOURTEENTH ASSIGNMENT OF ERROR.

> "The court erred in failing to grant these defendants a new trial because the verdict was the result of coercion and of mental and physical exhaustion."

It is not claimed on the part of the defendants' attorneys that the court made use of any instructions which would amount to coercion, but that the only coercion consisted in the forced continuance of deliberation through the long hours of the night resulting in some sort of compromise. The jury did not receive the instructions until about 9:45 in the evening and were called back in the court room about 1 o'clock in the morning, where they received some additional instructions or re-statement of the instruction on the question of intent; were then sent back to their room, and in the morning, about 7:00 o'clock were taken to breakfast and soon after their breakfast returned a verdict of guilty as to both defendants. It is claimed if there was any foundation for the claim of the defendants' attorneys that the verdict was a result of physical and mental exhaustion, it is hardly probable that such would be the case where soon after having their breakfast they arrived at a verdict. If the jury had found a verdict

before they had their breakfast it might then be more reasonably claimed that it was because of exhaustion after the night's work. But in this case it can hardly be claimed that such is the case, especially as the jury had not been out twelve hours when they arrived at a verdict. The attorneys in their brief cite the case of *Suslak* vs. *United States*, 213 Fed. p. 913, and is cited as an authority for their contention, which only goes to the question of recalling the jury for additional instructions, and the Judge, in rendering that opinion, says, on page 919, "it is not an uncommon practice, and it is entirely within the discretion of the Court to recall the jury for the purpose of giving additional instructions."

In the case of *Peterson* v. *United States*, 213 Fed. p. 920, in which the judgment of conviction was reversed, it will be noted that the same Judge who wrote the opinion in this court presided in the case at bar and his watchful care of the rights of the defendants was such that the experienced criminal attorneys for the defense did not find anything in his instructions to object to, and if, in fact, as stated by defendants' attorneys in their argument as to this assignment, "and if no objection was made then, none should be made now." *Robinson et al* vs. *VanHooser*, 196 Fed. 620. While the Peterson case was reversed, the instructions went so much further than the instructions in the case at bar that the Judge in writing that opinion was right in stating what he did regarding the instructions in that case, but did not make the mistake in this case of instructing the jury in such a way as was done in the Peterson case, and which he had so shortly before criticised.

DEFENDANT'S TWELFTH ASSIGNMENT OF ERROR.

"The court erred in permitting the Government to offer testimony showing that the defendant, W. G. Simpson, had borrowed from the American National Bank in September, 1913, $3500, because such testimony was highly prejudicial, threw no light upon the issue being tried, and certainly had nothing whatever to do with the intent that W. G. Simpson had in March, 1913, when they issued, if they did issue, and put forth the certificate in question."

ARGUMENT.

All that was said, or about which testimony was received in the case about the $3500 being borrowed by W. G. Simpson was in rebuttal of the defense that they had paid, or W. G. Simpson had paid, the $2500. The Court states in his instructions on page 82 of the transcript:

"Evidence of this fact of payment would not have been received but for one consideration, and that is the contention of the defendants that the money which was realized by using the certificate as collateral in Kentucky got into the private accounts of the defendants as the result of a misunderstanding between them, and that the mistake was not discovered until W. G. Simpson came to Idaho about the middle of August. If, to illustrate my meaning, the defendants had immediately repaired the wrong, before others had knowledge of the existence of the certificate, you might very properly conclude that the restoration to the bank of the value of the certificate at that time tended to corroborate their intention of innocent mistake."

Then in rebuttal the prosecution introduced testimony showing that the money realized from this certificate of deposit in question had not been used to pay the certificate when it be-

came due but that W. G. Simpson came back to Caldwell in the early part of August, knew at that time, and S. D. Simpson knew, that the certificate of deposit No. 1991 had been negotiated and that they had used the money, and in the face of that fact W. G. Simpson borrowed $3500 from the bank, did not pay into the bank the amount of the certificate at that time, but went back to Kentucky and in October, after the certificate had been paid by Director Walters at Caldwell, W. G. Simpson says he sent $2500 to pay the amount of this certificate, T. 135.

We submit that the instructions of the Court on this question were proper and that the evidence introduced by the government by way of rebuttal in showing that the $2500 had not been used for the purpose of paying the certificate, and that the $3500 was borrowed from the bank early in September, when both defendants knew that the certificate was out and no record made of it. On the face of that fact, W. G. Simpson returned to the east and for over a month paid no attention to this certificate of deposit and how it should be taken care of when it became due. The attorneys for the defense in their brief on page 59 state as follows:

> "In other words, the court said to the jury in substance, which drew its mind directly to this improper testimony showing that the defendant had secured $3500 from the bank the 1st of September:"

and then follows in quotation,

> "Now, gentlemen, if Simpson had used that $3500 which he got about the 1st of September to pay this certificate, then you might properly consider such payment as tending to corroborate what they have said about being innocently mistaken."

No such language was used by the Judge, nor any language that could be construed as meaning what is quoted above.

DEFENDANTS' TWENTY-THIRD ASSIGNMENT OF ERROR.

> "The court erred in failing to give the defendants' requested charge No. 5 wherein it was asked that the jury be told in substance that any intent that might have originated after the date of the issuing of the certificate with reference to the use of the $2,425 would not be the venal intent demanded under the statute and under the indictment before conviction, because the law demands that one's act be measured criminally by the intent existing at the time the act was committed."

ARGUMENT.

The Court charged the jury, "It is essential that a wrongful intent must have existed prior to the time the certificate was hypothecated in Kentucky, T. 84." The Court had also charged on page 70 as follows:

> "The offense defined by the statute is not complete unless there was at the time an intent to injure and defraud the bank or some other person."

The first overt act was the signing of the blank certificate by S. D. Simpson, at Caldwell, Idaho, and turning same over to W. G. Simpson there. Something yet remained to be done to carry out the intent of the crime and in this case that was the filling out and negotiating or hypothecating the certificate of deposit, which was filled out in Mississippi, and hypothecated or negotiated in Kentucky. On this view of the case, the Court was right in giving the above instructions, and so far as the record shows no exception was taken at any time to the above quoted part of the charge. In support of this view,

we wish to call attention to the evidence of S. D. Simpson, T. 104, when he was asked how many blank certificates he had given to W. G. Simpson at Caldwell, and he states that he gave him five or six. "Beginning with 1991?" A. "Yes." And on page 106 T., he states that on August 1st he issued to Mr. Johnson a certificate of deposit for one hundred and some odd dollars and changed one certificate No. 2000 to 1991 because they had no No. 1991 in the bank. At this time he had the other blanks that had been given to W. G. Simpson and knew that No. 1991 was out and who had it, and in this he is corroborated by W. G. Simpson, who says on p. 131 T., as to the question of the other blanks, "My mind is not exactly clear on that; seems to me I returned them by mail in July, but I am not sure." In the next answer he states practically the same thing. Anyway, there was no break in the certificates as issued by the bank after the No. 1991 and certificates 1992, 1993, 1994 and 1995, which both defendants testified had been given to W. G. Simpson in March, were in their regular order in the certificate of deposit book, corroborating the testimony of both of these defendants that the other certificates had been returned when the Johnson certificate was issued and supported the government's view that the No. 1991 certificate of deposit was issued to Johnson, the number thereon being changed and was done for the purpose of covering up the original certificate 1991, which was in their hands and hypothecated at the bank in Kentucky. Taking this in connection with the reason given on page 115 T., by W. G. Simpson that while in Caldwell in March, 1913, he was informed by his brother that a large amount of public money would be withdrawn from the bank, aggregating several thousand dollars, and the effect it would have on the bank,

and then on April 11, 1913, only two weeks thereafter in a letter from Lexington, Ky., to his brother, Page, Trans. 127-8, he writes as follows:

> "Your last statement shows a good reserve, and I cannot understand why you should carry such a large reserve for 15 per cent is all that is required by law, but I believe you should carry in that section at least 25 per cent, but it is better to be safe than sorry, so keep close to the shore, and if you need help I will do all I can to assist you."

There is no intimation in this letter anywhere that he was afraid of withdrawals from the bank, no inquiry as to how much money, if any, had been withdrawn from the bank, and the reason given, as he states, why he and his brother wished to raise money, seems to have been lost sight of entirely. And we find them, as shown by their own books and their own testimony, from this time on, using the proceeds of certificate of deposit No. 1991 for their own use. All this was before the jury. The letter, part of which is quoted above, was read to the jury, which found against the contention of defendants, and we submit that the evidence, even on the story of the defendants themselves should warrant the jury in finding the defendants guilty.

DEFENDANTS' TWENTY-FOURTH ASSIGNMENT OF ERROR.

> "The court erred in failing to give the defendants' specially requested charge No. 6, wherein it was asked that the jury be instructed to acquit the defendants since the proof did not establish the allegations in the bill of indictment with reference to the issuing and putting forth of the certificate of deposit in question within the jurisdiction of the court."

In answer to the argument in this case on the part of de-

fendants' attorneys we cite the court to Section 42 of the Judicial Code, and by the defendants' own testimony this certificate of deposit No. 1991 was signed in blank at Caldwell, Idaho, on the 27th of March, 1913, or about that time, and used by the defendant, W. G. Simpson, as shown in answer to Assignment No. 23.

DEFENDANTS' TWENTY-EIGHTH ASSIGNMENT OF ERROR.

> "The court erred in failing and refusing to give the defendants' requested charge No. 12, or the substance thereof, wherein it was sought to have the jury told that the law did not state when the consent of the board of directors should be secured for the issuance of a certificate of deposit, and therefore if they found that the board of directors, or if they had a reasonable doubt with reference thereto, accepted such certificate on September 27, 1913, accepted it as the debt of the bank, ratified its original issuing and putting forth and ordered the same paid, with full knowledge of all of the facts with relation thereto, then and in that event such consent and ratification dated back to the time of its original issuance and constituted a consent within the law, because the statute does not say how such consent shall be given, nor when such consent shall be given, nor does the statute fix any different rule of law than the well known rule of ratification, which dates back to the time of the doing of an unauthorized act and validates it the same as though the consent had been originally given at the very time the act was performed."

ARGUMENT.

In answer to this twenty-eighth assignment, this is sufficiently answered by the answer to the twenty-fourth and twenty-third assignments. Further than this, the records of the bank were all in evidence. Among the records was the record book showing the meetings of the board of directors dur-

ing the time the bank had been in existence, introduced by the defendants themselves, and if any such ratification as above shown was made, or could be made by the directors, it would show, or should show, in the records, and as explained on the part of the Government that there was never a ratification and could be no ratification. It is further claimed in the argument of this case on the part of defendants' attorneys, on page 71 of their brief, as follows:

> "The learned trial judge said that there would be no presumed authority for the cashier to issue a certificate unless the bank received to its credit an 'equivalent in value.' Now, may I, in all seriousness, ask just what was the 'equivalent in value of a blank certificate which called for no amount, was payable to no one and matured at no time?"

In answer to the above, we can say that the $2500 was the equivalent in value in this particular case. By signing a certificate in blank and sending it out, the cashier placed it in the power of whoever had it, to make the amount whatever the party receiving it wished to insert as the amount of the certificate. Various statements of this question on the part of defendants' attorneys seems to suggest its own answer, and with the power, as they claim, of the directors to ratify whatever may have been done by this party, whoever it might be. placed it within the power of the directors, if such could be done, to ratify a certificate of deposit for any amount, and to remove the criminality of the act by ratification. Surely, no such power lies with the directors or officers of the bank. when, as in this case, a certificate might be out for months unknown to everyone that should know the condition of the bank except the parties who would sign the certificate of deposit and negotiate the same.

DEFENDANTS' TWENTY-NINTH ASSIGNMENT OF ERROR.

"The court erred in failing and refusing to give defendants' requested charge No. 4-A, or the substance thereof, wherein it was sought to have the jury told that if the defendant, S. D. Simpson, delivered to the defendant, W. G. Simpson, in good faith and without any intent on his part to defraud the bank, the certificate in question, and that W. G. Simpson disposed of said certificate with the intent of applying the proceeds thereof to the use of the bank and did send the proceeds thereof in good faith to his co-defendant, S. D. Simpson, for that purpose, then and in that event, they should acquit the defendant, W. G. Simpson."

ARGUMENT.

Referring to page 83 of the Transcript of Record, the Court charged the jury as follows:

"I have further to advise you that if the certificate was issued by the defendant, S. D. Simpson, at or about the time mentioned in the information, and by said defendant delivered to the defendant, W. G. Simpson, in good faith, and without any intent on his part to defraud the bank in question, and that the defendant, W. G. Simpson, disposed of said certificate of deposit with the intent of applying the proceeds of the disposition of said certificate to the use of the said bank, and sent the proceeds thereof in good faith to his co-defendant, S. D. Simpson, with the expectation and instruction that the said defendant, S. D. Simpson would deposit said proceeds in said bank for the use and benefit of the bank, you could not find the defendant W. G. Simpson, guilty."

Not satisfied with this, the Court goes further and says:

"Nor, in such case, if S. D. Simpson innocently believed that the money he received was the personal funds of his brother, should he be found guilty. Nor, if the certificate was issued in good faith, for the purpose of getting funds for the bank and was hypothecated as col-

lateral for that purpose, and if the funds so realized were in good faith sent to the bank for its use and benefit, would the defendants or either of them be guilty of the offense here charged, if thereafter, that is, after the funds were sent to the bank, in good faith, for its use and benefit, and received by it, the defendants then misapplied them by appropriating them to their own personal use."

The Court in this case charged the jury in almost the words that the attorneys by Charge No. 4-A requested. He had formerly told them that they must find on all the material elements of the defense beyond a reasonable doubt and then explained very fully the law of reasonable doubt.

We further wish to call the Court's attention to the fact that a copy of the letter introduced as evidence on pages 127 and 128 of the Trascript of Record is not copied in full in the brief of defendants, pages 72 and 73.

We respectfully submit that the evidence was sufficient to convict the defendants of the crime charged; that the indictment was sufficient; that none of the assignments of error on the part of defendants are well taken, and the instructions of the Court to the jury were fair to the defendants and each of them and correctly stated the law.

Respectfully,

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